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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 629.

MRS. DAVID A. BUCKLEY,
*Petitioner,*

*vs.*

J. YANCEY CHRISTMAS,
*Respondent.*

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BEFORE PRINTING RECORD, AND PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF FOR RESPONDENT, IN OPPOSITION TO MOTION AND PETITION FOR A WRIT OF CERTIORARI.

E. MILTON ALTFELD,
Attorney for Respondent.

MALCOLM J. COAN,
Of Counsel.

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### MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BEFORE PRINTING RECORD.

In her Motion, Mrs. David A. Buckley alleges that the petition for certiorari assigns errors which raise only questions of law, and therefore she believes that

it will not be necessary to print the whole record on the petition for certiorari in this Court. Actually, your respondent submits that both of the questions raised by the petition for certiorari are questions of fact, and, therefore, it will be necessary to print the evidence relative thereto on the petition for certiorari.

Moreover, petitioner herself, on page 4 of the brief filed on her behalf in her appeal to the Circuit Court of Appeals, admitted that the questions arising on both First and Third Counterclaims (which represent the questions raised in her Petition for Certiorari) involved purely a question of fact, the contention of the Appellant being that the findings of the lower Court upon the Defendant's First and Third Counterclaims should be set aside because *clearly* erroneous under Rule 52(a) Federal Rules of Civil Procedure.

In the Petitioner's offer of stipulation, she omitted all evidence relative to said first and third counterclaims. Otherwise, and aside from this omission, your respondent immediately agreed to stipulate that the contents of the record should be the twelve items set forth on page 2 of said Motion and Petition. Counsel for respondent flatly and unequivocally deny that they refused to stipulate as to the record to be printed before a copy of the petition had been officially served on them, but they did refuse to stipulate that the evidence as to the first and third counterclaims be omitted, unless and until a carbon copy of a petition for certiorari had been served on them from which they might confirm petitioner's oral representations that the Petition would not raise such questions of fact.

WHEREFORE, it is respectfully submitted for the Respondent herein, that this Court refuse to authorize the filing of said petition for certiorari, without a printed copy of the record of evidence relative to the two questions of fact raised by said petition.

E. MILTON ALTFELD,
Attorney for Respondent.

MALCOLM J. COAN,
Of Counsel.

## QUESTIONS PRESENTED.

In her Petition for Certiorari (pp. 7-8) Mrs. David A. Buckley, in her statement of the questions presented in this Honorable Court for decision, specifies four questions which are not in such form as to express the actual and essential questions presented.

The actual questions presented to and decided by the Court below were:

1. What amount, if anything, was due the petitioner on her first counterclaim relating to the transaction between herself and the respondent as to the mare "Cleaning Time"?

2. What amount, if anything, did the respondent agree to pay the petitioner for the services of the stallion "Grand Time", sold by the former to the latter, and made the subject of petitioner's third counterclaim?

## STATEMENT.

The statement contained in the Petition for Certiorari is, it is respectfully submitted, incomplete and therefore the Respondent submits the following statement of facts:

The proceeding in the District Court was by the Respondent on an open account amounting to $4,988.90 for services rendered and expenses incurred by him as trainer of Petitioner's race horses (R. 3). Petitioner in her Answer disputed some of the items in said open account and in addition filed five (5) counterclaims aggregating $8,188 (R. 6). The District Court, without a jury, disallowed all of Petitioner's counterclaims, and rendered judgment allowing Respondent's claim as

stated, less the sum of $224.00, which Respondent had conceded (R. 214).

Petitioner appealed to the Circuit Court of Appeals on the correctness *vel non* of the District Court's refusal to allow her first and third counterclaims, designating same as involving questions of fact only (Appellant's Brief, p. 4).

Petitioner's first counterclaim alleged Respondent's indebtedness to her in the sum of $1,500, representing the purchase price on an alleged sale by her to Respondent of the mare "Cleaning Time" (R. 4). The Respondent denied ever having purchased said mare, and alleged Petitioner had sold said mare to him "on the cuff" for a price to be determined in the future by what she had to run for in order to win a race.

The District Court, in refusing said counterclaim, found that there never was any sale of said mare for $1,500, a flat price of $1,500, but that the arrangement was "on the cuff", as claimed by the Respondent (R. 213).

The Circuit Court of Appeals affirmed this finding of fact, and noted that Respondent's testimony that the expenses of the mare was more than her earnings was not contradicted (R. 224). The Circuit Court of Appeals found that at the time the suit was instituted nothing was in fact due on said counterclaim (R. 225).

Petitioner's third counterclaim was for the sum of $1,500 allegedly due for three services at $500 each of Petitioner's stallion "Grand Time". Respondent flatly denied any such agreement, and contended these services were to be free of charge, as a part of the consideration for the sale of this stallion by the Respondent to the Pe-

titioner. The District Court admitted in evidence a written memorandum relating to said free stud services, but disregarding said memorandum, decided the issue in favor of the Respondent on his testimony and on disbelief in Petitioner's testimony (R. 191).

The Circuit Court of Appeals held said written memorandum was inadmissible, but noted that the opinion of the District Court shows its finding was not based upon the written memorandum, but rather on the oral testimony of the Respondent, and further noted that the District Court gave weight to the circumstance that Petitioner during the long period of time in which Respondent's claim was made and the institution of this suit had made no mention of the claim she now makes for the services of this stallion (R. 208). The Circuit Court of Appeals thereupon held that in accordance with Rule 52(a) of the Rules of Civil Procedure, they could not say that the action of the District Court in refusing to allow Petitioner's third counterclaim was clearly erroneous, and accordingly affirmed the judgment of the District Court (R. 226).

## ARGUMENT.

### POINT I.

**THE CIRCUIT COURT OF APPEALS HELD, AS DID THE DISTRICT COURT, THAT AT THE TIME RESPONDENT'S SUIT WAS INSTITUTED, THE PETITIONER WAS NOT ENTITLED TO ANY OFFSET, AS AGAINST RESPONDENT'S CLAIM, BY REASON OF THEIR TRANSACTIONS UP TO THAT TIME CONCERNING THE MARE "CLEANING TIME", THE SUBJECT OF PETITIONER'S "FIRST" COUNTERCLAIM.**

In refusing to allow Petitioner's first counterclaim, the District Court said:

> "The first one relates to a claim growing out of the purchase by plaintiff from defendant of a mare

called Cleaning Time. All of the negotiations, conversations and arrangements appear to have been verbal in connection with this transaction, or by letter. There was no formal agreement. I am not impressed with the contention of defendant that plaintiff agreed to pay her a flat price of $1,500. Plaintiff's contention is that, while the whole matter was admittedly handled in a very loose manner, with a good deal of 'backing and filling', what finally happened was that, after trying to sell the mare for the defendant at various agreed prices, and after the mare's track performances were not up to original expectations, he offered to take her, speaking in the vernacular of the track, 'on the cuff'; namely, that he would not have to stand to lose anything out of his own pocket; that if there were no net winnings there would be no payment; and that plaintiff agreed to this arrangement. While neither side is to be defended for entering into such a loose agreement, we do not have to go to the race track to find that sort of thing being done every day, by persons who then come into court and try to get the court to tell them what their rights are. This transaction was admittedly of an extremely unbusiness-like character, but after weighing the evidence I feel that the plaintiff's story is the one that is entitled to credence and that there was no agreement whereby the plaintiff was bound absolutely, as the defendant claims, to pay $1,500 for the purchase of the mare Cleaning Time. While some prima facie inference to the contrary might be reasonable, on account of the change in registration of the mare from the defendant's name to that of plaintiff's wife, such inference is overcome by other circumstances in the case, including the long delay on the part of the defendant in asserting this claim. This matter of delay on defendant's part I will refer to again." (R. 213.)

The Circuit Court of Appeals, in affirming the District Court's refusal of said first counterclaim finding same not clearly erroneous and therefore under Rule 52(a) U. S. C. A. refusing to disturb said finding of fact, said:

> "The transaction between appellant and appellee with reference to the mare 'Cleaning Time' is not made entirely clear by the evidence. In the same letter whereby appellant's employment as trainer was terminated, appellant requested appellee to try to sell this mare for '$1,500, if possible; if not, $1,250,' offering him ten percent sales commission if he should make such sale. Appellee was unable to make a sale of the mare and subsequently, in a telephone conversation with appellant, entered into an arrangement with her whereby, as appellee testified, he bought the mare 'on the cuff'. He explained that this arrangement was understood by both parties to mean that he would buy the mare on condition that he would be allowed to pay for her out of winnings and that her value would be determined by what she had to run for in order to win a race. He further testified that the expenses of the mare amounted to more than her winnings, and this testimony was not contradicted. He still has the mare in his possession, and has raced her several times. Appellant's testimony as to the transaction concerning the mare 'Cleaning Time' differs in many respects from that of appellee. She testified that appellee agreed to buy the mare and to pay $1,500.00 as the purchase price; but her testimony agrees with that of appellee in that both say it was a condition of the purchase that appellee would be permitted to pay for the mare out of winnings; and she made no claim against appellee for any sum by reason of the transaction respecting the mare 'Cleaning Time' until after the suit was instituted." (R. 224.)

The Circuit Court then further found that it was not necessary to pass on the present or future rights and liabilities of the parties to this suit, with respect to this counterclaim.

> "It suffices to say that at the time this suit was instituted appellant was not entitled to any offset, as against appellee's claim, by reason of their transactions up to that time concerning the mare 'Cleaning Time'."

Under such a state of facts, would the Circuit Court of appeals be required to hold up the appellee's right to a judgment for the amount due him, until the lapse of months, or maybe years, so as to determine the future financial result of the racing of this mare?

Petitioner is in error in contending that Rule 54(b) of the Federal Rules of Civil Procedure applied to the refusal of this counterclaim. Said rule applies only where the plaintiff has more than one claim in his action. As soon as all the issues to any one of the plaintiff's several claims, and *all counterclaims arising out of the transaction or occurrences, which is the subject matter of the claim,* the Court may enter a judgment disposing of such claim. The rule then provides that the Court may stay the execution of such judgment *until the entering* of a subsequent judgment.

Obviously, said rule has no application to a case of several counterclaims, as to one of which counterclaims, the Court, as it did in regard to Petitioner's "first" counterclaim, finds nothing to have been due at the time of the institution of the suit.

## Point II.

**THE ERROR RESPECTING THE ADMISSION OF THE WRITTEN AGREEMENT (EXHIBIT 5) WAS RENDERED HARMLESS BY THE FACT THAT THE DISTRICT COURT EXPRESSLY DISREGARDED SAID AGREEMENT, AND BASED ITS DISMISSAL OF PETITIONER'S "THIRD" COUNTERCLAIM, ON ITS BELIEF IN RESPONDENT'S TESTIMONY IN REGARD THERETO AND DISBELIEF IN PETITIONER'S TESTIMONY, AND THE CIRCUIT COURT OF APPEALS, WHILE HOLDING SAID WRITTEN AGREEMENT INADMISSIBLE, AFFIRMED SAID FINDING OF FACT UNDER RULE 52(A) OF THE RULES OF CIVIL PROCEDURE.**

The District Court admitted in evidence Exhibit 5,—the written agreement (R. 191).

The District Court's opinion furthermore shows it attached little value to said written agreement; characterizing it as ambiguous. The District Court said:

> "However, I do not think it necessary to rest a denial of this counterclaim upon this contract. I am satisfied from the statement of Mr. Christmas, which I believe is entitled to credence, that there was really never any understanding that these particular services were to be charged for. That is evidenced by the fact that no charges were ever made of a similar nature, and the present claim was never asserted until the commencement of this suit" (R. 207).

The District Court did not, as the Brief supporting the Petition for Certiorari herein contends, limit the use of Petitioner's evidence to the clarification of the alleged written memorandum, but on the contrary, considered said evidence, and disbelieved it especially because it had the earmarks of being a recent fabrication.

The opinion filed by the Circuit Court of Appeals (R. 208) fully supports the above version of the District Court's opinion:

> "However, the opinion of the District Court shows that its finding was not based upon the written memorandum, but rather upon the oral evidence of the appellee, who testified that it was understood by all parties, and was a part of the consideration for the sale of 'Grand Time', that appellee was to have free service of the stallion. Furthermore, the District Court gave weight to the circumstance that during all the period of time which elapsed between appellee's discharge as trainer and the institution of this suit, appellant made no mention of the claim she now alleges for services of this stallion, although during that period appellee was making continuous efforts to get a settlement of his account from appellant."

The attempt, on page 19 of Petitioner's Brief, to make capital out of the words "displace this written one" in the opinion of the District Court, is, we submit, disingenuous. To begin with, said words are merely illustrative. This is obvious in the light of the preceding paragraph of the District Court's opinion and findings hereinabove discussed.

The District Court, in the preceding paragraph, had declined to base its opinion on the written contract, but instead accepted the statement of Mr. Christmas "that there was really never any understanding that these particular services were to be charged for".

The Court thereafter used the language quoted on p. 19 of Petitioner's Brief, wherein it reverts to said alleged written agreement, only to declare it ambiguous, and proceeds to demonstrate its uncertainty assuming

Furr had authority to sign, and was present to testify as to its meaning. Finally, the District Court again concludes that Defendant's present interpretation as to what the understanding between the parties was is negatived by her own conduct in never acting in accordance with such interpretation over such a long period of time.

## CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondent herein, that the Motion and Petition of Mrs. David A. Buckley for a Writ of Certiorari should be denied.

E. MILTON ALTFELD,
Counsel for Respondent.

MALCOLM J. COAN,
Of Counsel.